

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MIC:DET:TL-N-6257-99

TSMurphy

date:

to: District Director, Michigan District
Taxpayer Advocate Office
Attn: Darlene Richardson

from: District Counsel, Michigan

subject: Advisory Opinion Regarding Abatement of
Assessments Made Pursuant to a Tax Court Decision

SSN: [REDACTED]

This advisory opinion is in response to a request from the Taxpayer Advocate Office, requesting advice regarding the abatement authority pursuant to I.R.C. § 6404(a) with respect to an assessment made pursuant to a Tax Court decision.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Collection, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Collection and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

Whether the taxpayer's income tax assessments, which were made pursuant to Tax Court decisions, should be abated pursuant to I.R.C. § 6404(a) as a result of there being excessive in amount,

barred by the statute of limitations, or because they were erroneously or illegally assessed.

CONCLUSION

The tax liability for the three years at issue was determined by the Tax Court based on the facts presented at two trials. The tax assessments made pursuant to the Tax Court decisions were not excessive in amount, assessed after the expiration of the period of limitations applicable thereto, nor erroneously or illegally assessed. Thus, the taxpayer is not entitled to relief of the liabilities at issue pursuant to I.R.C. § 6404(a).

FACTS

The taxpayer was divorced on [REDACTED], pursuant to a Default Judgment of Divorce entered in the [REDACTED], Michigan (Circuit Court). Pursuant to the Judgment of Divorce, the taxpayer was to receive child support payments and alimony payments. The taxpayer's ex-husband deducted his alimony payments as provided by I.R.C. § 215. Pursuant to I.R.C. § 71, the taxpayer was required to include in income all amounts received as alimony. The taxpayer failed to include all of the payments designated as alimony for the taxable years [REDACTED], [REDACTED], and [REDACTED], and as a result of audits by the Internal Revenue Service, additional tax liabilities were determined.

The taxpayer filed petitions with the Tax Court with respect to the taxable years [REDACTED], [REDACTED], and [REDACTED], wherein she contested the Service's recalculation of additional tax due based on the taxpayer's failure to include in income the alimony payments received. On [REDACTED], the United States Tax Court issued an opinion wherein it found that the taxpayer owed additional tax liabilities with respect to the alimony payments received during [REDACTED]. On [REDACTED], the United States Tax Court issued an opinion wherein it found that the taxpayer owed additional tax liabilities with respect to the alimony payments received during [REDACTED] and [REDACTED]. In both of these opinions, the Tax Court reached its decision relying on case law from the United States Supreme Court. See Commissioner v. Lester, 366 U.S. 299 (1961).

During [REDACTED], the taxpayer filed a motion with the Circuit Court requesting a modification of the Judgment of Divorce, which request included the issue of the alimony payments. After conducting an evidentiary hearing, the Circuit Court issued an Opinion and Order on [REDACTED], wherein it found that the alimony payments were actually child support payments, however, they were classified as alimony in order to allow the taxpayer's ex-husband the tax benefits. The Circuit Court modified the alimony payments to child support payments retroactive to [REDACTED] of

██████████, since it had no jurisdiction to modify payments made prior to that date. The Circuit Court did "clarify" that the alimony payments were intended as child support payments. On ██████████, the Circuit Court issued an Order Clarifying Judgment of Divorce and Denying Defendant's Motion for Reconsideration, in accordance with its Opinion and Order of ██████████.

On ██████████, the taxpayer filed a Motion for Reconsideration of the opinion filed on ██████████, wherein the taxpayer requested the Tax Court reconsider its previous opinion due to the Order and Opinion filed by the Circuit Court. On ██████████, the Tax Court issued an Order denying the taxpayers request stating the Circuit Court's modification of the Judgment of Divorce did not apply to the ██████████ and ██████████ years, and thus, the taxpayer is not entitled to the relief requested. In summary, the Tax Court upheld its prior decision wherein it found that under Federal law, the payments designated as alimony payments by the Judgment of Divorce, were taxable to the taxpayer.

Finally, on ██████████, the Circuit Court issued an Order wherein it stated that the payments made pursuant to the Judgment of Divorce are child support payments. This Order was based on a stipulation entered into by the taxpayer and her ex-husband.

The taxpayer then requested the Service abate her tax liabilities resulting from the alimony payments based on this Order from the Circuit Court. It should also be noted that with respect to the taxpayer's ex-husband, the statute of limitations has expired and no adjustments can be made with respect to his alimony deductions, thus, the stipulation had no impact on him whatsoever.

Advice has now been requested as to whether the tax liabilities may be abated pursuant to I.R.C. § 6404(a).

ANALYSIS

Pursuant to I.R.C. § 6404(a), the Service may abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability, if the assessment is made subsequent to the expiration of the period of limitations applicable thereto, or if the assessment has been erroneously or illegally made.

Based on the information contained in the case file, there is no claim or allegation that the tax liabilities at issue were assessed after the expiration of the statute of limitations or that the assessments were erroneously or illegally made. The sole issue in this case is whether the tax liabilities assessed against the taxpayer are excessive in amount; i.e., in excess of the correct tax liability.

The facts of this case show that a Judgment of Divorce was entered into between the taxpayer and her ex-husband. Although the taxpayer did not sign the judgment, she did agree to entry of the judgment on record in open court on the day of her trial. The attorney for the taxpayer testified in the evidentiary hearing that the Judgment of Divorce was structured so that the taxpayer's ex-husband could receive as much of a tax break as possible, and thus, the payments were classified as alimony. Thus, despite the fact that the payments may in fact represent child support payments, the parties involved and the Circuit Court voluntarily chose to label the payments as alimony. Subsequent to the entry of the judgment, the taxpayer claimed she became aware of the tax consequences and began her attempts to modify the judgment.

The Tax Court on two separate occasions, addressed this issue. The issue for the Tax Court in both instances was whether the payments constituted alimony, resulting in taxable income to the taxpayer. In both cases, the Tax Court, relying on case law from the Supreme Court, found that under Federal law, the characterization by the Circuit Court as alimony was binding, absent a retroactive modification by the Circuit Court. In the Order and Opinion from the Circuit Court, the Court admitted it had no jurisdiction to modify or reclassify the alimony payments as child support payments prior to [REDACTED] of [REDACTED].

Thus, based on the facts and law at the time the Tax Court made its determination, the payments received by the taxpayer constituted taxable income. Further, the agreement by the taxpayer and her ex-husband to modify the judgment with respect to the prior alimony payments was nothing more than an attempt to circumvent the jurisdiction of the Circuit Court. This agreement, which was formalized by the Circuit Court, does not have any impact on the prior Tax Court decisions since it is not a modification by the Circuit Court, but rather, an attempt to relieve the taxpayer of her income tax liabilities. Further, this attempt by the parties to circumvent the Circuit Court jurisdiction prejudices the Service since the taxpayer's ex-husband previously took deductions for the alimony payments and the statute of limitations prevents the Service from now examining those tax years.

In summary, the parties voluntarily entered into the Judgment of Divorce and intentionally labeled the payments as alimony in an attempt to maximize tax benefits. Absent a modification of the judgment by the Circuit Court, the Tax Court was bound to follow the Circuit Court characterization of alimony. In applying Federal law the Tax Court made its determination of the taxability of the payments. Based on the facts and law, the Tax Court made the correct decision and the assessment of these liabilities was correct. Thus, there is no basis for finding that the tax liabilities assessed against the taxpayer with respect to the

unreported alimony payments was in excess of the correct amount, and the taxpayer is not entitled to any relief pursuant to I.R.C. § 6404(a).

If you have any questions or require any further assistance, please feel free to contact the undersigned at (313) 226-2165.

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